the emergence of a special cable TV franchise, the municipal regulatory authority over local rights-of-way is leveraged into a new creation altogether. It becomes a barrier to entry, a costly hurdle new entrants must scale to obtain the right to offer service to the public. Thus, the cable franchise reimposes the feared hold-up, subjecting consumers of video distribution services to the cross subsidy demands of local monopolists, regulators, and interest groups.

23. This franchising process, severed from its ostensible public policy purpose, can now be viewed as a naked restraint of trade. The rationale for the license is not logically connected to the means selected. This verdict is doubly true whenever a telephone company requests permission to serve a community with video signals in an area where it already serves customers with telephone access lines. Only if community residents are more greatly disturbed by the electronic transmissions of one mode versus the other, a dubious biological proposition, can the public rights-of-way argument for cable franchises be invoked. That is because the franchises issued telephone companies by state public utility commissions are themselves designed to minimize public disruption. For a firm already constrained by law to observe the rules of the road to be subjected to a new legal gauntlet based upon the distinct *content* of the electrons its transports can only be explained by the blatantly protectionist nature of the local cable franchise.

24. The curious status of the telephone company entrant into local video markets today is that, as onerous and anti-competitive as the single barrier of local franchising can be, such effects are reinforced by the duplicative 214 waiver process at the Federal Communications Commission.

That is, entrants must surmount not one but two barriers in order to provide competition. This evidently compounds the impact of the franchise barrier.

25. Cable market incumbents have not been slow to grasp the availability of the 214 waiver process as a backstop against competitive forces. The propensity of cable market incumbents to use the double barrier of the franchising process coupled with an FCC 214 waiver application to block market entry is vividly on display in the current reaction to the issuance of three franchises to a subsidiary of telephone company Ameritech. According to a recent trade journal report: "In a July 11 letter to FCC Chairman Reed E. Hundt, NCTA urged the Commission immediately to ask Ameritech whether it has begun constructing video systems 'in any of the Michigan communities in which it has obtained a cable franchise and to require a response in writing -- yes or no -- within 24 hours.' If construction has begun, NCTA said, 'the Commission should move immediately to require Ameritech to cease and desist.'"[30]

26. The tenacity of the National Cable Television Association in advancing federal jurisdiction in this instance is apparent, a position rationally motivated by a desire to delay competition. Given that local and state authorities have permitted the firm to provide service, why should an extra layer of authority -- one not imposed on cable firms -- be required? While it is not now necessary for *cable* firms to receive federal authority to enter local markets, it is best to remember that when it was (following the FCC's 1966 Report & Order on cable television), the

---

[30] "Ameritech Awarded Two More Cable TV Franchises; Cable Industry Demands FCC Authorization Before Construction," *The Cable-Telco Report* (14 July, 1995), p. 1.

process was clearly used by broadcasters to suppress cable competition. The cable industry knows the procedure well, because so recently its members were its victims.[31]

27. That the 214 application process is an effective barrier to competition can be seen from the briefest review of its history. In 1987 the Commission began the rulemaking procedure which is now known as Video Dialtone and found by 1988 that competition was sorely needed in the cable television industry.[32] Rules were crafted for common carrier television service provided by phone companies in 1992, and at least 39 applications have been received.[33] Although a single video dialtone system is now approved (New Jersey Bell's Dover Township System), excepting some very limited trials no service is yet available to consumers.[34] While Video Dialtone has thus far kept regulators busy with an abundance of process, it has not proven effective in moving competition into the video marketplace for consumers.

28. In summary, expectations that the 1992 Cable Act would quickly remedy the problems of monopoly market structure in local cable television markets have been dashed. The evidence in the FCC's 1994 Cable Report, bolstered by more recent market data, is that cable systems are worth about four times the replacement cost of tangible capital. Moreover, various output

---

31 Stanley Besen and Robert Crandall, "The Deregulation of Cable Television," *Law & Contemporary Problems 44* (Winter 1981), pp. 77-124; Thomas W. Hazlett, "Station Brakes," Reason (February 1995), pp. 40-47; Thomas W. Hazlett, "How Washington 'Saved' Us From Cable," *Wall Street Journal* (23 March, 1995), p. A14.

32 Federal Communications Commission, "Notice of Proposed Rulemaking In the Matter of Telephone Company-Cable Television Cross Ownership Rules, Sections 63.54-63.58." CC Docket No. 87-266 (20 July, 1988).

33 Comments of the Video Dialtone Association, "In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming," CS Docket No. 95-61 (30 June, 1995), Exhibit 1.

34 *Ibid.*, p. 3.

measures indicate that cable subscribership has not increased relative to trend during the post-Act period. Hence, what was a monopoly problem -- with prices set too high and outputs too low -- remains a monopoly problem. Cable consumers would be well served, then, by policies which facilitate enhanced competitive forces. Unfortunately, policies today often have just the opposite effect. Foremost among these are the franchising hurdles which potential competitors face in merely obtaining permission to enter monopolized markets. At the local level, regulatory burdens are imposed which force entrants to shoulder the burden of proof in establishing that competition will benefit the public. The case is intellectually easy to make; as a practical matter, however, such determinations are likely to be highly politicized affairs which tilt towards incumbents strategically gaming the system to delay or deter competition. The 214 waiver application process at the FCC, applied as a second tier franchise requirement for telephone companies seeking to compete in multichannel video markets, compounds the leverage of incumbents seeking to thwart entry. Subjecting market newcomers to such hurdles is inherently anticonsumer. Instead, it is the *status quo* which should be subjected to a burden of proof on the question: What will be worse than monopoly?

Thomas W. Hazlett
Short Bio
May 1995

Professor Hazlett teaches economics and public policy at the University of California, Davis, where he is an associate professor of agricultural economics and Director of the Program on Telecommunications Policy at the Institute of Governmental Affairs. He earned his doctorate in economics from UCLA in 1984. In 1991-92 he served as Chief Economist of the Federal Communications Commission in Washington, D.C., and in 1990-91 he was a Visiting Scholar at the Columbia Institute for Tele-Information at the Columbia University Graduate School of Business.

Dr. Hazlett is a frequent contributor to such general interest periodicals as the *Wall Street Journal*, the *New York Times*, the *Chicago Tribune*, *Reader's Digest*, *Across the Board*, *Chief Executive*, and *The New Republic*. He writes a monthly column for *Reason*, and previously served as a contributing editor to *Harper's*. In addition, his academic research has been published in leading scholarly journals including the *Journal of Law & Economics*, *Economic Inquiry*, *Southern Economic Journal*, *Public Interest*, *Regulation*, *Managerial & Decision Economics*, *Yale Journal on Regulation*, *Telecommunications Policy*, *Journal of Broadcasting & Electronic Media*, *Harvard Journal on Law & Public Policy*, and the *University of Pennsylvania Law Review*. In addition, he has served as an economic expert for numerous private firms and government agencies, and serves as a Consultant-to-the-Firm to Micronomics, an economic consulting and research organization based in Los Angeles.

Professor Hazlett is an internationally recognized expert on government regulation of business, specializing in the area of telecommunications policy. Hazlett is a member of the Mt. Pelerin Society, a Senior Research Associate of the Columbia Institute for Tele-information, and a Senior Fellow of the Liberal Institute in Prague, Czech Republic. In 1990-91 he was awarded the Wriston Citicorp Fellowship, a prize awarded annually by the Manhattan Institute to a young scholar working in an important area of public policy

<u>CERTIFICATE OF SERVICE</u>

I hereby certify that I have this 28th day of July, 1995 served all parties to this action with a copy of the foregoing **REPLY COMMENTS** by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties listed below.

Gwendolyn M. Burleson

Gwendolyn M. Burleson

Frank M. Sahlman, Sr.
President
Vermont Wireless Coop
5 Fairground Road
P. O. Box 268
East Corinth, VT 05040

Charles S. Walsh, Esq.
Seth A. Davidson, Esq.
Fleischman & Walsh, L.L.P.
1400 16th Street, N.W., Suite 600
Washington, D.C. 20036
Counsel for CNBC

Betsey L. Anderson, Esq.
Edward D. Young, III, Esq.
Michael E. Glover
Bell Atlantic
1320 N. Court House Road
Arlington, VA 22201

Barry S. Abrams, Esq.
Campbell L. Ayling, Esq.
Robert A. Lewis, Esq.
NYNEX
1111 Westchester Avenue
White Plains, NY 10604

Benjamin J. Griffin, Esq.
Kathleen A. Kirby, Esq.
Reed Smith Shaw & McClay
1301 K Street, N.W.
Suite 1100 - East Tower
Washington, D.C. 20005
Counsel for Home Box Office

John B. Richards, Esq.
John Reardon, Esq.
Keller & Heckman
1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001
Counsel for NRTC

Henry Goldberg, Esq.
W. Kenneth Ferree, Esq.
Goldberg, Godles, Wiener & Wright
1229 Nineteenth Street, N.W.
Washington, D.C. 20036
Counsel for Optel, Inc.

John F. Raposa, HQE03J27
GTE Service Corporation
P.O. Box 152092
Irving, TX 75015

Bonnie J. K. Richardson
Motion Picture Association of
America, Inc.
1600 Eye Street, N.W.
Washington, D.C. 20006

David J. Gudino, Esq.
1850 M Street, N.W.
Suite 1200
Washington, D.C. 20036
Counsel for GTE

Stuart W. Gold, Esq.
Cravath, Swaine & Moore
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
Counsel for Time Warner

Michael H. Hammer, Esq.
Thomas Jones, Esq.
Willkie Farr & Gallagher
Three Lafayette Center
1155 21st Street, N.W.
Washington, D.C. 20036
Counsel for Time Warner

Michael H. Hammer, Esq.
Francis M. Buono, Esq.
Michael G. Jones, Esq.
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N.W.
Suite 600
Washington, D.C. 20036
Counsel for General Instrument Corp.

Henry M. Rivers, Esq.
Jay S. Newman, Esq.
Ginsburg, Feldman & Bress Chtd.
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
Counsel for Liberty Cable Company,

Mark Melnick
Stephen A. Hildebrandt
Group W. Satellite Communications
Gaylord Entertainment Company
250 Harbor Drive
Stamford, CT 06904

Gary Epstein, Esq.
James H. Barker, Esq.
Latham & Watkins
Suite 1300
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
Counsel for DIRECTV

Andrew R. Paul
Sr. Vice President
Government Affairs
Satellite Broadcasting &
Communications Association
225 Reinekers Lane
Suite 600
Alexandria, VA 22314

Daniel L. Brenner, Esq.
Neal M. Goldberg, Esq.
Loretta P. Polk, Esq.
Counsel for NCTA
1724 Massachusetts Ave., N.W.
Washington, D.C. 20036

Burt A. Braverman, Esq.
John C. Dodge, Esq.
Cole, Raywid & Braverman, LLP
1919 Pennsylvania Ave., N.W.
Suite 200
Washington, D.C. 20006

Edwin M. Durso, Exec. Vice President
& General Counsel
ESPN, Inc.
ESPN Plaza
Bristol, CN 06010

David Cosson, Esq.
L. Marie Guillory, Esq.
NTCA
2626 Pennsylvania Avenue, N.W.
Washington, D.C. 20037

David R. Charles
Chairman & CEO
Satellite Receivers, Ltd.
1740 Cofrin Drive
Green Bay, WI 54302

Adrian Cronauer, Esq.
Maloney & Burch
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

Paul J. Sinderbrand, Esq.
William W. Huber, Esq.
Sinderbrand & Alexander
888 Sixteenth Street, N.W.
Fifth Floor
Washington, D.C. 20006

Paula Argento, Esq.
Gerald Stevens-Kittner, Esq.
Arter & Hadden
1801 K Street, N.W.
Suite 400K
Washington, D.C. 20006
Counsel for CAI Wireless
& Heartland Wireless

Lawrence W. Secrest, Esq.
Peter D. Ross, Esq.
Wayne D. Johnson, Esq.
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006
Counsel for Viacom, Inc.

Robert M. Lynch
Paula J. Fulks
SBC Communications Inc.
175 E. Houston
Room 1212
San Antonio, TX 78205

Benjamin J. Griffin, Esq.
James J. Freeman, Esq.
Reed Smith Shaw & McClay
1301 K Street, N.W,
Suite 1100 - East Tower
Washington, D.C. 20005
Counsel for Pay-Per-View
d/b/a Viewer's Choice
Counsel for Primestar Partners

Michael L. Pandzik, President
National Cable Television
Cooperative, Inc.

Samuel A. Simon, Esq.
901 15th Street, N.W.
Suite 230
Washington, D.C. 20005
Counsel for: METS Fans/
VA Consumers for Cable/
Fairfax Co. Citizens